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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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Since respondent and its supporters ignore and/or mischaracterize relevant record portions and cases, a response is warranted.[1]

[1] We refer to the briefs of petitioner, respondent, Civil Liberties Unions and N. Y. Times et al. by Pet. Br., Resp. Br., CLU Br. and Media Br., respectively. Reference to record portions is the same as in our principal brief. Pet. Br. 1-2 n.1.

I. THE "DE NOVO REVIEW" MADE BY THE COURT OF APPEALS DID NOT COMPLY WITH THE STANDARD OF REVIEW REQUIRED BY THE FIRST AND FIFTH AMENDMENTS.

Respondent argues that in First Amendment cases an "independent appellate review" is mandatory, (Resp. Br. 42-62; see also Media Br. 10-17, CLU Br. 7-24) and that Federal Rule of Civil Procedure 52(a) should have no application to such "independent appellate review." Resp. Br. 62-77; see also Media Br. 18-21, CLU Br. 19.

Petitioner agrees that "independent examination of the whole record," *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), is necessary and proper. But the "de novo review" actually conducted by the Court of Appeals (App. X22) violates not only Rule 52(a) but also the Due Process Clause of the Fifth Amendment. Pet. Br. 40-49, 61-70.

In the present case the Court of Appeals conducted a "de novo review" foreclosed by both Rule 52(a) and the Fifth Amendment, disregarding the trial court's findings on credibility of witnesses and giving credence to testimony which the trial court had found not credible.

But the requirement for an "independent examination of the whole record" does not allow the appellate court to conduct a "de novo review" of the transcripts of the testimony of witnesses to determine for itself, from the cold printed record, what testimony should be believed and what should not be believed.

Appellate review of the whole record must be a review of the evidentiary support for the facts found by the trial court, and not a de novo finding of facts from the evidence in the printed record.

In a bench trial, the determination

of "the facts of the case" must be entrusted to the Article III trial judge. He has seen and heard the witnesses during direct and cross examination (e.g., App. X141, J.A. 169), including their testimony about documentary exhibits prepared by them while testifying (e.g., PX29, PX35), and has questioned them to clarify points (e.g., J.A. 122-24). He thus is able "to evaluate the credibility of witnesses and weigh the evidence." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 (1982). *Accord, Rogers v. Lodge*, __ U.S. ___, ___, 73 L. ed. 2d 1012, 1021 (1982), citing the same passage from *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 287 (1982) we have quoted. Pet. Br. 41.

Petitioner submits that in a case governed by constitutional law (App. X22-23) which has been tried to an Article III judge who has made detailed findings of

fact in accordance with Rule 52(a), the proper standard of "independent appellate review" is this:

1. The appellate court must determine whether the *facts* found by the trial court are sufficient to support the judgment.

2. The appellate court must determine whether there is evidence, which, if believed by the trial court, is sufficient as a matter of law to support the findings of fact.

3. The appellate court must *not* make its own findings of fact *de novo* based upon evidence found in the printed record.

4. In determining whether the evidence could support the findings of fact, the appellate court must *not* attribute any weight to testimony at trial which the trial court found to be not credible, because Rule 52(a) "recognizes and rests

upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Laboratories*, 456 U.S. at 855. Appellate judges cannot question or observe witnesses.

Thus in a "public figure" libel case the appellate court must (1) ascertain whether or not the trial court found that the defendant published a false statement of fact with knowledge that it was false or with reckless disregard of its truth or falsity; (2) if the trial court found such facts, determine whether there was "clear and convincing" evidence which, if believed by the trial court, *could* support such findings; (3) avoid making any *de novo* findings of fact from the printed record; and (4) give no weight to testimony of witnesses which the trial court found to be not credible.

The standard of "independent review" set forth above is consistent both with the constitutional requirements for "independent examination of the whole record" set forth by this Court in *Edwards* and *New York Times*, and with the requirements of due process and Rule 52(a). Pet. Br. 40-49, 61-70.

We have shown that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" in Rule 52(a) is mandated by the Due Process of Law clause of the Fifth Amendment. Pet. Br. 61-70. Neither respondent nor any of its supporters has made any argument to the contrary in their briefs.

The appellate court should not review the evidence in the record to decide whether in the judgment of the appellate court the evidence *does* support the judg-

ment below, but instead should "review the evidence . . . to determine whether it *could* constitutionally support" the judgment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-285 (1964) (emphasis added).

The appellate court should determine whether there is "sufficient evidence to *permit* the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added), and not whether weighing the evidence in a "de novo review" persuades the appellate judges to the same conclusion reached by the trial judge.

If the case is tried to a jury rather than a judge and there is sufficient evidence to support a finding of actual malice, ". . . it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood." *Time, Inc.*

v. Hill, 385 U.S. 374, 394 n.11 (1967).

The Ninth Circuit Court of Appeals followed this decision in adhering to the standard of "independent appellate review" which is described above. *Cher v. Forum International*, 694 F.2d 634, 640 (9th Cir. 1982), *cert. denied*, ___, U.S. ___, 77 L. Ed. 2d 1350 (1983):

> Because of the First Amendment implications in this case, we have examined the trier's findings with the extra care required in such cases. We are satisfied that the trier could find, from the record as a whole, that . . . the advertising staff engaged in the kind of knowing falsity that strips away the protection of the First Amendment. Whether we agree with the trier's finding of knowing falsity, or fall back a step to reckless disregard for the truth, there is enough evidence to support the material findings under Fed. R. Civ. P. 52 against Forum International, Ltd.

That case demonstrates that an appellate court may examine "the trier's findings with the extra care required in such cases" in conducting an independent

examination of the "record as a whole" while still applying the "clearly erroneous" standards of Rule 52(a).

In the present case, the Court of Appeals failed to adhere to the standard of "independent review" set forth above.

Instead, it undertook a "de novo review (App. X22)" and asserted, "In performing this review we are not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) . . . (App. X22)."

The Court of Appeals acknowledged that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact (App. X23)," but then proceeded to reverse the judgment for petitioner on the basis of testimony of an employee of the respondent which the trial court expressly had found to be "wholly untrustworthy" and "not credible (App. X163, n.33)."

With respect to the required proof of "actual malice," the Court of Appeals applied a rule of substantive law completely at variance with prior decisions of this Court. The Court of Appeals said:

> The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by inference . . .. A court typically will infer actual malice from objective facts . . .. These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice. Such evidence is lacking in this case (App. X27-28).

The Court of Appeals cited no authority for the proposition that petitioner was required to "provide evidence of negligence, motive, and intent."

It is apparent that the Court of Appeals failed to recognize the well-established distinction between "actual malice" in the common law sense (where "motive" and "intent" lie at the heart of

"malice") and "actual malice" of the type required by *New York Times* -- knowledge that the statement was false or reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Annot., 61 L. ed. 2d 975, 995-96 (1980) and cases cited.

Seligson, the author of the false and disparaging statement on which liability was found, was an employee of respondent (App. X51). Since Seligson knew the statement was false, his knowledge of falsity must be attributed to respondent. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 253-254 (1974). Neither respondent nor its supporters have contended otherwise; their briefs do not cite or mention *Cantrell*.

Petitioner consistently has contended that Seligson *knew* that the statement was false when he wrote it; and that is

precisely what the District Court found to have been proved by clear and convincing evidence:

> [T]he Court further finds that at the time of the Article's publication Seligson *knew* that the words "individual instruments . . . tended to wander about the room" did not accurately describe the effects that he and Lefkow had heard during the "special listening test." Consequently, the Court concludes, on the basis of *proof which it considers clear and convincing*, that the plaintiff has sustained its burden of proving that the defendant published a false statement of material fact *with the knowledge that it was false* or with reckless disregard of its truth or falsity (App. X142-143; emphasis added).

"Clear and convincing" proof that Seligson knew that the statement was false -- testimony at trial of Seligson himself -- is described in our brief. Pet. Br. 10-11, 66-68. See also Pet. Br. 18-24, 27-28, 31, 50-61.

Petitioner was not required to prove "negligence, motive, and intent (App. X27-28)." It was sufficient to prove that

Seligson, who was the author of the statement and an employee of respondent, knew that it was false. The statement of the Court of Appeals that "Such evidence is lacking in this case," referring to evidence of "negligence, motive, and intent (App. X28)," shows that the Court of Appeals not only erroneously conducted a "de novo review," but also misconceived the meaning of the *New York Times* "actual malice" test.

The Court of Appeals then proceeded to an extensive analysis of the "editorial procedures (App. X32)" employed by respondent in reviewing Seligson's draft of the Article, with repeated references to the conduct and state of mind of the "associate technical director" of respondent (App. X33-34).

The evidence on which the Court of Appeals relied for its conclusion that

"CU's editorial procedures reveal no evidence of actual malice (App. X32)," was the testimony of Monte Florman (J.A. 195-221), who had been the associate technical director of respondent when the Article was prepared and published (J.A. 196), which testimony the trial judge had found to be "wholly untrustworthy" and "not credible (App. X163 n.33)."

The Court of Appeals also appeared to give credence to Seligson's testimony to the effect that he believed the false statement to be true when he wrote it (compare App. X34-35 with J.A. 124, 169-170), despite the District Court's express finding that Seligson's testimony on that point was "not credible (App. X142)."

Thus, in relying upon testimony of Florman and Seligson which the trial judge had found to be "not credible (App. X163 n.33, App. X142)," the Court of Appeals

disregarded the requirements of Rule 52(a) and the Fifth Amendment.

The findings that the testimony of Florman and Seligson was not credible cannot be deemed "clearly erroneous", or even erroneous. Their credibility was destroyed by cross-examination at trial. *Infra*. 33-39.

If appellate courts are allowed to conduct a "de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law" and "not limited to the clearly erroneous standard of Fed. R. Civ. P. 52(a) (App. X22)," the inevitable result will be less justice and more appeals as losing parties seek what amounts to a "new trial" in the Court of Appeals.

This result recently was recognized in Griswold, *Helping the Supreme Court by*

reducing the flow of cases into the courts of appeals, 67 JUDICATURE 58, 64 (August 1983):

> Independent review of facts by the courts of appeals. One aspect of activism which gives me concern is the extent to which appellate courts in our system now independently review the facts found by the district courts. Our system is supposed to proceed on a division of labor. The fact determinations are made in the district courts, either by jury or by the judge, as trier of the facts; and the courts of appeals are responsible for seeing that the law was correctly applied. Rule 52 of the Federal Rules of Civil Procedure, promulgated by the Supreme Court, provides that "Findings of fact shall not be set aside unless clearly erroneous." And a similar rule applies to an exercise of discretion by the district court.
>
> In recent years, however, the courts of appeals have more and more been undertaking comprehensive review of factual determinations by the district courts, and the Supreme Court has done little to change this practice. What are the consequences of this? They are numerous, but one of them is that very few counsel feel that they can drop a case even though the facts have been found against them in the district court. Under current practice, there is a

> considerable chance that counsel can persuade the court of appeals to undertake a general review of the facts, and to reach its own conclusion. This is, indeed, an example of the "reaching out" which has become endemic among the courts in recent years. It is, I suggest, a considerable factor in the volume of cases coming to the courts of appeals, and thus to the Supreme Court.

The rule stated by the Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-56 (1982), requiring an appellate court to accept the trial court's findings unless left with the "definite and firm conviction that a mistake has been committed," was recently supported in the comments accompanying the Preliminary Draft of Proposed Amendments to the FEDERAL RULES OF CIVIL PROCEDURE by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States in August 1983. In urging uniform adoption of the clearly erroneous standard of review of findings

of fact, "whether based on oral or documentary evidence" giving due regard to both "the opportunity of the trial court to judge of the credibility of the witnesses and to the need for finality," the Committee Note said:

> Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 536 (1963).
>
> . . .
>
> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus

> eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

See also, Annot. 72 L. Ed. 2d 890, 894 (1983).

The instant case demonstrates the soundness of this reasoning. The District Court had the benefit of observing Seligson testify on six trial days (Tr. 6-111 through 11-80), Florman (Tr. 11-81 through 12-129) and Lefkow (Tr. 12-129 through 13-157) each testify on two days, and Dr. Bose testify on five trial days (Tr. 2-6 through 5-159, 19-68-160).

The District Court also conducted its own examination of the witnesses where

clarification of their testimony was desired (See, e.g., J.A. 56, 124, 166, 208, 219, 253-54), a procedure not available to an appellate court. Appellate judges should not have more power to determine the author's state of mind than the trial judge who actually heard him testify.

Due process requires that findings of fact not be set aside unless clearly erroneous. Pet. Br. 61-70. Adherence to the "clearly erroneous" rule maintains the legitimacy of the trial process in district courts in the eyes of litigants, reduces appeals by discouraging appellate retrial of factual issues, and enables the appellate courts to further reduce litigation through clear exposition of rules of law that govern the primary pre-litigation conduct of citizens to facilitate conformity therewith and thereby avoid litigation.

II. IN FINDING "ACTUAL MALICE", THE DISTRICT COURT DID NOT APPLY A "REASONABLE MAN" TEST, DID NOT EQUATE FALSITY PLUS INTELLIGENCE WITH ACTUAL MALICE, AND DID NOT RELY SIMPLY ON DISBELIEF OF SELIGSON, BUT FOUND "ACTUAL MALICE" BECAUSE IT FOUND THAT SELIGSON KNEW THAT WHAT HE WROTE WAS FALSE, AND BECAUSE IT DID NOT BELIEVE HIS TESTIMONY THAT WHAT HE WROTE DESCRIBED WHAT HE HAD OBSERVED.

At trial Seligson, the author of the false statement "Worse, individual instruments heard through the Bose system . . . tended to wander about the room (App. X145, X159-160)" drew a sketch to show what he had observed during the "special listening test (PX 29, J.A. 342; J.A. 149-160)." It showed that he heard the sounds of a violin coming from various points between the two Bose loudspeakers (J.A. 158-159).

On cross-examination he was asked why he had used the words "tended to wander about the room" to describe what he had drawn (J.A. 169) and he replied:

> The word "about" meant just as I drew it on the board (J.A. 169).

He earlier had testified that the word "about" as used in the false statement "was meant to mean about the rear wall, between the speakers," but took no issue with the Court's observation that "That isn't what it says, though (J.A. 124)."

The District Court made note of Seligson's testimony as to what "wander about the room" meant to him and said:

> After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible. Seligson is an intelligent person whose knowledge of the English language cannot be questioned (App. X142).

Using that language of the District Court as a springboard, respondent and its supporters leap to the following arguments:

(a) That the District Court

improperly applied a "reasonable man" test in finding actual malice. Resp. Br. 65, 66, 69, 72-74; Media Br. 19, n.11.

(b) That the District Court simply equated the intelligence of Seligson plus the falsity of the statement with "actual malice." Resp. Br. 32, 71; CLU Br. 27.

(c) That the District Court relied upon only disbelief of Seligson as the basis of finding "actual malice." Resp. Br. 41, 102-103; CLU Br. 24-25.

Petitioner agrees that the state of mind required for "actual malice" is actual knowledge of falsity (or reckless disregard for the truth), and not what "an ordinarily prudent man" would have believed. See, *e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 73, (1964).

Petitioner agrees that a finding that the author of false statement was an intelligent person would not, standing

alone, be sufficient to prove "actual malice."

And petitioner agrees that disbelief of the testimony of a witness, without more, is not sufficient to support an affirmative finding to the contrary.

But the arguments made by respondent and its supporters simply ignore and disregard the essential evidence which led the District Court to its conclusion that petitioner had proved "actual malice" by "clear and convincing evidence (App. X142-143):" Seligson's testimony as to what he actually heard during the special listening test (J.A. 158-159).

The trial judge's finding that Seligson's testimony, to the effect that he believed that what he wrote accurately described what he had observed (J.A. 124, 147, 169), was not credible (App. X142-143) was only the last link in the chain.

A simple parable may serve to put the arguments of respondent and its supporters into proper perspective. Let us assume the following facts:

1. Bowes, the mayor of a large city (and clearly a "public figure"), is indicted and tried for the crime of accepting bribes from contractors who did business with the city.

2. The jury returns a verdict of "not guilty" on all counts.

3. On the following day, the local newspaper publishes an article which says, "Yesterday afternoon Mayor Bowes was convicted by a jury of accepting bribes from contractors who did business with the city."

4. Bowes sues the publisher of the newspaper for libel. Bowes concedes that he is a "public figure" but contends that the defendant has published a false

statement with "actual malice" -- with knowledge that the statement was false.

5. At trial of the libel action, to a judge without a jury, Arnold L. Scoop testifies as follows:

> My name is Arnold L. Scoop. I have been employed by the defendant publisher as a reporter for 25 years. I have been covering criminal trials in the local courts for 25 years. I am familiar with court procedures. I am a graduate of Harvard College and the Columbia School of Journalism (Compare App. X50-52).
>
> I wrote the article which said that Mayor Bowes had been "convicted." I was in the courtroom when the jury verdict was announced, and I heard the foreman of the jury say "not guilty on all charges." I used the word "convicted" in my article because the word "convicted" meant just what I heard in the courtroom. The word "convicted" was meant to mean "found not guilty. (Compare App. X141, J.A. 124, 169)." I still believe the article was accurate and not misleading (Compare J.A. 147).

6. The trial judge makes the following findings:

If Scoop is to be believed, at the time of publication of the article he interpreted, and he still interprets today, the word "convicted" to mean "found not guilty (Compare App. X141-142)."

After careful consideration of Scoop's testimony and of his demeanor at trial, the Court finds that Scoop's testimony on this point is not credible. Scoop is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible to believe that he interprets a commonplace word such as "convicted" to mean anything other than its plain ordinary meaning (Compare App. X142).

Based on the above finding that Scoop's testimony to the contrary is not credible, the Court further finds that at the time of the article's publication Scoop knew that the word "convicted" did not accurately describe what he heard in the courtroom. Consequently, the Court concludes, on the basis of proof which it considers clear and convincing, that the plaintiff has sustained his burden of proving that the defendant published a false statement of material fact with the knowledge that it was false or with reckless disregard of its truth or falsity (Compare App. X142-143).

On the facts set forth in the hypothetical example above, can there be any

doubt that the trial judge was warranted in finding clear and convincing evidence of "actual malice?" The author has admitted that what he wrote was different from what he actually heard.

But let us carry our parable one step further:

7. The defendant publisher appeals from a judgment for Mayor Bowes to an appellate court. The appellate court reviews the evidence at trial, notes that there was evidence that the article written by Scoop was reviewed by the editor of the newspaper and several other employees of the newspaper before it was published, observes that Scoop testified without contradiction that he thought that "convicted" meant "just what he heard in the courtroom (found not guilty)," disregards the trial judge's finding that such testimony was not credible, and rules

that the plaintiff has failed to prove by "clear and convincing evidence" that the defendant published the false statement with knowledge that it was false or with reckless disregard of its falsity. The appellate court further says that in using the word "convicted" the defendant may have "been guilty of using imprecise language (compare App. X35)," but that this does not support an inference of actual malice, because in fact Bowes was indicted and tried for a crime and the "editorial procedures" of the defendant reveal no evidence of actual malice (compare App. X32).

Can there be any doubt that the decision of the appellate court is erroneous, where the author of the article has admitted that he heard the "not guilty" verdict announced and the trial judge has found his testimony that he thought

"convicted" meant "just what he heard in the courtroom (found not guilty)" was not credible?

What respondent and its supporters have ignored in their arguments is the fact that the District Court after hearing Seligson testify as to what he actually observed during the "special listening test," found that Seligson *knew* that what he wrote was not true (App. X142-143).

No amount of argument about principles of constitutional law can overcome the fact respondent published a false and disparaging statement of fact which the author, its employee, knew to be false.

III. THE DIFFERENCE BETWEEN THE FALSE STATEMENT ATTRIBUTING BIZARRE AND GROTESQUE QUALITIES TO THE BOSE SYSTEM AND THE TRUTH OF OBSERVING NORMAL STEREO SOUND WAS NOT TRIVIAL.

The Media Brief in its Conclusion, Media Br. 21, suggests that there was only

a slight distinction between the words "Worse[2], individual instruments heard through the Bose system . . . tended to wander about the room" used by respondent and the phrase "tended to wander along the wall" (which the writer suggests "the trial court would have held nonactionable"), and points to the alleged "triviality of these verbal distinctions." Media Br. 21.

In fact, the difference betwen what the "panelists" Seligson and Lefkow testified they actually observed and what Seligson wrote the "panelists" observed was far from "trivial".

The difference between what Seligson and Lefkow actually observed and the phenomenon described in the false and disparaging statement published by

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[2]Respondent and its supporters ignore the impact of the word "Worse." Resp. Br. 27-29, 35, CLU Br. 4-6, Media Br. 5-7. Compare App. X105-06.

respondent is not merely a difference in degree or one of exaggeration. It represents a transition from the real world of normal stereo sound into a Twilight Zone that is bizarre (App. X101), grotesque (App. X105), and scientifically impossible (J.A. 28). Pet. Br. 9-15, 18-19, 55, 58-59, 66-68.

IV. THE FINDINGS BY THE DISTRICT COURT THAT FLORMAN'S TESTIMONY WAS WHOLLY UNTRUSTWORTHY AND NOT CREDIBLE AND THAT SELIGSON'S TESTIMONY WAS NOT CREDIBLE WERE NOT CLEARLY ERRONEOUS.

On at least five occasions the Court admonished Florman for being evasive (Tr. 12-4, 12-5, 12-20, 12-30, 12-36, 12-37, 12-48).

We turn now to specific instances which support the finding of the District Court that Florman's testimony was wholly untrustworthy and not credible (App. X163).

(a) Florman contradicted himself in

first denying and then admitting that at the June 3, 1970, meeting at respondent's laboratories Dr. Bose specified what was wrong with the Article (Tr. 11-98, 11-104, 11-105, 11-111-112, 11-114, 11-116-118, J.A. 209-13).

(b) Florman contradicted himself overnight at trial in first admitting and then denying authorizing Seligson to proceed with exploiting his patented loudspeaker (Tr. 11-85-86, 11-90-91, 12-7).

(c) Florman contradicted himself in first denying and then admitting that he had seen a copy of Seligson's patent before his deposition was taken in this case on December 18, 1975 (Tr. 11-119-20, 11-125, 12-3-6).

(d) Florman testified that prior to June 3, 1970, Seligson never had informed him that the invention described in Seligson's patent as a loudspeaker (PX 11,

Tr. 123, 125, Tr. 11-121-22), was a loudspeaker, and never believed that it was a loudspeaker (Compare Tr. 11-120-23 with Tr. 138, 9-40). Seligson had testified that he told Florman that the patent was on a loudspeaker (Tr. 138, 9-40).

(e) Florman contradicted himself in first testifying unequivocally that Seligson had told him that a model of Seligson's invention never had been completed and then denying so testifying (Tr. 12-23, 12-25-29).

(f) Florman testified at trial that during the course of a listening test of the Bose 901 loudspeakers in respondent's laboratories on June 16, 1970, he discussed what he heard with then technical director Kaplan (Tr. 12-79), in conflict with his prior deposition testimony to the effect that there had been "no discussions

during the test (Tr. 12-80-81)." See also Tr. 12-85-91, DX B-E, Tr. 11-109, 11-111.

The finding of the District Court that Seligson's testimony that he believed that the false statement accurately described what he had observed (J.A. 124, 147, 169) was not credible (App. X141-142) was not clearly erroneous.

Seligson's own testimony about what he had observed (J.A. 124, 149-160) was irreconcilable with what he wrote.

But that was not the only evidence leading to the conclusion that his testimony was not credible. On several occasions the court admonished Seligson for evasion or argument in his response to questions (Tr. 9-44, 9-57, 9-58, 10-105, 10-106).

(a) In his pretrial deposition testimony, Seligson testified that he and Lanier, a former employee of respondent,

completed a model of their patented loudspeaker (Tr. 131A, 9-43, 11-28), but at trial he denied completing it (Tr. 9-42). See also Tr. 11-29-30.

(b) His testimony was inconsistent as to whether or not he and Lanier continued working on the invention after Lanier left the employ of respondent (Compare Tr. 8-50 with Tr. 9-59-60).

(c) At trial he testified that Shair, a former employee of respondent, had been one of the two "panelists" who participated in the "cricket test" (Tr. 6-126, 7-20, 7-23, 9-88, 9-92, 11-25), in conflict with his deposition testimony that Shair did not participate in the loudspeaker evaluation project (Tr. 9-94-95).

(d) Seligson also lied about references to a loudspeaker causing a musical instrument to wander about the room in

published articles (Compare Tr. 10-72, 10-77) with Tr. 10-97-100, J.A. 192-93).

(e) Furthermore, Seligson was deliberately evasive as to who had selected himself and Lefkow to be the "panelists" for the "special listening test," but finally admitted that he had (Tr. 7-23, 9-129, J.A. 97).

(f) He testified on direct examination that he had received a letter from petitioner (DX B-S. Tr. 8-63, 8-64) which he said "seemed like a job offer (Tr. 8-62). On cross-examination he not only contradicted that testimony, but also denied that he had so testified (Tr. 10-129).

These examples of Seligson's conflicting, evasive and argumentative testimony slanted to favor what he perceived as the best interest of respondent at any

given moment lends support to the District Court finding on actual malice, "After careful consideration of Seligson's testimony and of his demeanor at trial, the Court finds that Seligson's testimony on this point is not credible (App. X142)." This finding is hardly a finding that Seligson "was not to be believed soley because he 'is an intelligent person whose knowledge of the English language cannot be questioned.'" Resp. Br. 32.

V. THE DISTRICT COURT FOUND THAT RESPONDENT NOT ONLY DECEIVED CONSUMERS IT PLEDGES TO SERVE BY MAKING A FALSE AND DISPARAGING STATEMENT ABOUT PETITIONER'S BOSE 901 LOUDSPEAKER, BUT ALSO IN FALSELY REPRESENTING IT RATED THE LOUDSPEAKERS BY OBJECTIVE STANDARDS AND MISLEADINGLY USING "PANELISTS."

Respondent contends that respondent's "very favorable reputation for independence, integrity, accuracy, and freedom from bias (App. X4, X45)" is "well-deserved," in its argumentative "Statement of the Case." Resp. Br. 2-3 n.2.

In addition to finding that respondent knowingly falsely disparaged the Bose 901 loudspeaker, the District Court found that the Article made other false and misleading statements. The District Court found:

> The Court agrees with the plaintiff that the Article implies that the accuracy of the tested loudspeakers was determined in an objective fashion. CU's statement that "(l)oudspeaker quality . . . can be measured in the lab . . . ," creates the impression that such measurements made in a laboratory are objective ones, rather than the type of subjective judgments made by Seligson. The Court also agrees that the foregoing implication was false. The fact that objective scores were determined is of little consequence in view of the fact that Seligson subsequently altered those objective scores to conform to his subjective judgments. In addition to the fact that the tests that were performed on the conventional loudspeakers lacked objectivity, no objective scores at all were determined for the Bose 901 or for the HK-50 loudspeaker (App. X76-77).

"Panels"

The words "panel" and "panelists" appear throughout the Article, especially in the Bose 901 Portion. The Article does not explain, however, that there were in fact three different panels involved in testing the loudspeakers -- the "A-B listening test" involved a panel of five CU employees, the "cricket test" utilized a panel of two CU employees, and the "special listening test" involved only Seligson and Lefkow. The plaintiff claims that CU's use of the words "panel" and "panelists" without explaining that three different panels were involved was misleading. It was also misleading, according to the plaintiff, for CU to use the word "panel" when referring to only two people. Seligson himself testified that the use of the word "panel" to describe two persons could be "possibly a mite misleading." Tr. 9-89.

While the Court agrees that CU's use of the words "panel" and "panelists" was misleading to the readers of the Article, it is difficult to see what harm such misleading use of terms caused the plaintiff (App. X70-71).

VI. PETITIONER INTRODUCED EVIDENCE OF THE TWELVE YEARS OF RESEARCH BEHIND THE BOSE 901 LOUDSPEAKER AND RESPONDENT'S "RESEARCH DATA."

Respondent falsely states:

Consumers Union produced at trial

> all of its research data and editorial material. Bose produced nothing; Resp. Br. 93-94.

In fact, petitioner introduced over respondent's objections (Tr. 2-74) reprints of articles describing the twelve years of research behind the BOSE 901 loudspeaker system (PX18, Tr. 2-74, 2-75).[3]

Furthermore, petitioner introduced a number of the project data books containing the results of the tests and measurements conducted by respondent in its laboratories (PX8, Tr. 59, PX15, Tr. 149, 150; PX16, Tr. 151; PX17, Tr. 152). Petitioner also introduced the notebook Seligson kept documenting his research on his patented loudspeaker (PX12, Tr. 130).

Petitioner also introduced into

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[3]Ten copies of PX18 have been deposited with the Clerk for the convenience of the Court.

evidence a measurement made by Dr. Bose demonstrating that one reflection could not be much stronger than the direct sound (PX40, Tr. 19-99, 19-109; PX41, Tr. 19-106, 19-109).

VII. THE "STANDARDS OF VERBAL ACCURACY" REQUIRED OF PUBLISHERS ARE BY NO MEANS IMPOSSIBLE TO ARTICULATE OR TO MEET.

The Media Brief contends that the First Amendment rights of authors and publishers would be "threatened" by a rule of law which would subject them to "standards of verbal precision that are as impossible to articulate as they are to meet," Media Br. 3, and offers a dire prophecy that reversal of the Court of Appeals decision in the present case "would threaten all journalism." Media Br. 21.

Petitioner respectfully suggests that the "standards of verbal accuracy" which authors and publishers are required to meet are not impossible to articulate.

They may be found in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964): He who publishes a false statement of fact with knowledge that it is false, or with reckless disregard for whether it is false or not, risks liability for damages for the harm caused by that false statement.

To articulate those standards is possible, for this Court has done it. To meet those standards may require some modest degree of honesty, integrity, and care on the part of those who write and publish. We should expect no less from those persons who possess the awesome power to ruin personal reputations and destroy business enterprises by reckless use of the printed word.

The law as developed through decisions of this Court during the past twenty years does not even require that publishers speak the truth. All it requires

in the case of "public figures" is that publishers not print deliberate or reckless falsehoods. If such a rule "would threaten all journalism," Media Br. 21, then journalism threatens all of us.

CONCLUSION

For the foregoing reasons and those advanced in our brief, the judgment of the Court of Appeals should be reversed, with instructions to affirm the District Court judgment for petitioner on liability and to conduct its review of the findings on damages in conformity with the requirements of Rule 52(a).

Respectfully submitted,

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